Supreme Court, U.S.
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No. 99-1370

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK, ET AL.
Petitioners,

v.

YONKERS BOARD OF EDUCATION, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT YONKERS BOARD OF EDUCATION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that the State of New York and officials of the State were liable under the Equal Protection Clause and the Equal Educational Opportunities Act ("EEOA") for school segregation in the City of Yonkers where the District Court found—and it is undisputed in this Court—that the State and its officers

- "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials," and
- "knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de jure*, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated."

2. Whether the Second Circuit correctly held that the State remained liable for contributing to the funding of a remedy for unaddressed vestiges of segregation on the facts of this case.

3. Whether the Second Circuit correctly held, as every other federal court to consider the issue has done, that the EEOA abrogates a State's Eleventh Amendment immunity from suit in federal court.

4. Whether the Second Circuit correctly held the State institutional defendants liable under the EEOA on the facts of this case.

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BRIEF IN OPPOSITION OF RESPONDENT YONKERS BOARD OF EDUCATION

Respondent the Yonkers Board of Education respectfully requests that this Court deny the petition for a writ of certiorari seeking review of decisions of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

The petition for writ of certiorari is the latest effort of the State of New York and various state-related entities and officials (collectively, "the State") to avoid their responsibility for assisting in the completion of the desegregation remedy in the Yonkers public schools. The State's petition seeks review of two decisions of the Second Circuit address-

ing the State's participation in two distinct desegregation plans adopted for the Yonkers schools. In the court of appeals' most recent decision, it relieved the State and local defendants of responsibility for the second of those plans, the so-called Educational Improvement Plan ("EIP") II. The court reversed the district court's finding that certain vestiges of segregation remained, and remanded the case to the district court "for a limited purpose," Pet. App. 6a—"to make further findings on the present record and in light of this opinion as to whether—or not—there are remaining vestiges of segregation in the Yonkers school system." *Id.* at 5a. Thus, to the extent the petition challenges continued proceedings related to EIP II—which was vacated by the Second Circuit and will "doubtless be revisited" on remand, *id.* at 31a, 26a—it is premature; there has yet to be a final determination of whether unaddressed vestiges of segregation remain in Yonkers, let alone whether the State is responsible for remediation efforts as to any such vestiges.

Perhaps in recognition of the prematurity of any challenge to the Second Circuit's handling of issues related to EIP II, the State's petition focuses primarily on issues related to the earlier remediation plan—referred to as EIP I—which were largely addressed in the Second Circuit's 1996 decision. *Id.* at 66a. The State filed a petition seeking review of that decision in 1997 (No. 96-1628), raising the same arguments—in many places using essentially the same language—as it now raises here. The Court denied the State's 1997 petition, and nothing in the current petition calls that decision into question. In fact, the petition cites no new intervening developments or decisions in other circuits demonstrating that the issues it presents are the subject of continuing debate in the lower courts. There is no more reason to grant review of the Second Circuit's 1996 decision now than there was three years ago. The petition therefore should be denied.

COUNTERSTATEMENT

1. This school desegregation case was initiated in 1980 by the United States (later joined by the NAACP) against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. In 1985, the district court found, *inter alia*, that the City and the Yonkers Board had unlawfully segregated the public schools in Yonkers, in violation of the Fourteenth Amendment. 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

In affirming that decision, the Second Circuit recognized that "race-based decisions" had contributed to school segregation and inequalities in Yonkers in a number of areas, including: (i) the special education program; (ii) the vocational education program; (iii) the quality of school facilities and programs generally; and (iv) school staffing. 837 F.2d at 1195-1208, 1226-33. The Second Circuit also affirmed the district court's finding that there was an "interrelationship" in Yonkers between the unlawful segregation of schools and unlawful segregation of subsidized housing as a result of site selection decisions that concentrated subsidized housing in Southwest Yonkers, where schools had disproportionately minority enrollments, and maintained the "all-white" character of other areas and schools in the City. *Id.* at 1185-94, 1208-09, 1214-15.

2. In 1986, the district court approved a school desegregation remedy, *see* 635 F. Supp. 1538, which effectively ended the segregation of students among school facilities in Yonkers. The court specifically has found that, "[a]s a result of the good faith and zealous implementation by the Yonkers Board of Education and its staff of this Court's initial School Remedy Order of May 13, 1986 (Educational Improvement Plan ("EIP") I)," the Yonkers Board "achieved desegregation of enrollments among the schools" in "less than a year of the issuance of EIP I." 833 F. Supp. 214, 216 (1993).

The plaintiffs, however, soon concluded that EIP I, while effective in ending overt segregation among schools, was not and would not be effective in eliminating to the extent practicable inequalities in the educational program, in-school segregation, and other vestiges of the unlawful dual school system, or in supporting effective desegregation of schools in Yonkers pending implementation of the housing remedy. The plaintiffs filed motions to add the State defendants as parties to the case, and the Yonkers Board sought leave to file a cross-claim.[1] The proposed pleadings alleged that the State had contributed to unlawful segregation in Yonkers and therefore could be held liable and required to participate in the additional remedial measures needed to complete the process of making the Yonkers public schools a unitary system.

After substantial delays caused in large measure by the State's actions, the district court granted the motions to add the State defendants and conducted a three-week trial addressed to the issue whether "vestiges of segregation remain in the Yonkers Public School system" which were not being "adequately addressed" by EIP I. Pet. App. 208a. The district court defined "[a] vestige of segregation" as "a policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects," *id.* at. 213a, consistent with this Court's holdings in *United States* v. *Fordice*, 505 U.S. 717 (1992), and *Freeman* v. *Pitts*, 503 U.S. 467 (1992). Using this definition, the district court found that "vestiges of segregation remain in the Yonkers Public School system" and that the EIP I desegregation remedy was "inadequate to eradicate vestiges of

[1] The State defendants included the State itself, the State Education Department ("SED"), the State Urban Development Corporation ("UDC"), and the Board of Regents, which are collectively referred to as "the State institutional defendants." Also included were the individual Regents of the Board of Regents, the Commissioner of Education, and the Director of the UDC (collectively "the State officials").

segregation 'root and branch' and must be expanded." Pet. App. 228a.

3. In 1994, the district court conducted a six-week trial on whether the State was liable for unlawful school segregation and its vestiges in Yonkers as of the time of the district court's 1985 decision. Plaintiffs presented testimony from over thirty witnesses as well as over 2,000 exhibits. The district court received testimony from members and former members of the Board of Regents, a former State Commissioner of Education and a former Deputy Commissioner, key officials from the SED, the former head of the UDC, and UDC officials who were responsible for its subsidized housing in Yonkers. The court also received testimony from Yonkers officials and community leaders who interacted with the State on school and housing issues.

The district court made extensive factual findings, which were either unchallenged or affirmed on appeal. These included findings that:

- "[T]he State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*." Pet. App. 134a.
- The State "possessed the full means and authority to deal with Yonkers school segregation, had it been inclined to do so." *Id.* at 183a. *See also id.* at 140a ("the State had several effective means for compelling local compliance with its racial integration policy during the years at issue in this litigation. If the State did not in fact force compliance, it certainly was not because it lacked the authority or practical power to do so").
- Rather than using that authority, "the State defendants did nothing to remedy school segregation in Yonkers,

using none of their power and authority toward that end." *Id.* at 76a. "Rather than act, the State waited." *Id.* at 140a.

- To the extent it did act, moreover, "the State took certain actions that had the effect of *encouraging* that segregation." *Id.* at 77a (emphasis added).
- "The *reasons* for the State defendants' actions and inactions * * * were that those defendants were responding to pressures by New York State officials and constituents who opposed desegregation on grounds that were known to be race-based." *Id.* at 78a (emphasis added). *See also id.* at 143a (State's "determined reluctance" to address racial segregation in Yonkers was because "race-based political opposition to integration throughout New York State eventually exerted enough pressure on [State education] officials as to cause them to become cautious and reactive on the issue of desegregation"). The pressures to which State officials responded, the lower courts found, "can only be explained in racial terms." *Id.* at 80a, 183a.
- The State's "race-based" conduct had the effect of perpetuating unlawful segregation in Yonkers in both "obvious" and "more subtle, but equally real" ways. *Id.* at 147a. "The most obvious way was that 'Yonkers was not forced to desegregate its schools.' " *Id.* at 80a (quoting *id.* at 147a).
- Like the State itself, the UDC—"perhaps the most powerful state housing and development agency ever created," *id.* at 149a—"had the power to take steps to alleviate" the unlawful segregation in Yonkers but "failed to do so, and instead worsened segregation by knowingly bowing to political pressure it knew to be race-based." *Id.* at 82a.

Despite these findings, the district court concluded "with reluctance," *id.* at 183a, that there was insufficient evidence to find the State officials liable under 42 U.S.C. § 1983. It relied solely on its resolution of the "close and difficult question," Pet. App. 165a, of interpretation of the decision in *Arthur* v. *Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *See* Pet. App. 160a-166a; 179a-182a. It also found that the claims against UDC and its officials were time-barred. *Id.* at 177a-179a. In a separate opinion, the district court declined to hold the State institutional defendants liable pursuant to the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. § 1701 *et seq.*, or Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See* Pet. App. 185a-204a.

4. On respondents' appeal, the State challenged "only the finding that the State defendants knew or reasonably should have known that the segregation in Yonkers was *de jure* rather than *de facto*." Pet. App. 99a. After reviewing the evidence, the Second Circuit held that it "amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was *de jure*." *Id.* at 102a. The Second Circuit also found based on a review of the evidence that the district court's other factual findings—essentially not challenged by the State defendants—were "amply supported." *Id.* at 105a.

On the strength of the district court's factual findings, the Second Circuit unanimously reversed the district court's admittedly "reluctan[t]" conclusion, *id.* at 183a, that the State defendants could not be held liable. After reviewing "fundamental principles governing equal protection claims," *id.* at 91a; *see id.* at 91a-96a, the court found that "[t]hese principles govern the present case," because the district court "found that the State knew of the segregation in Yonkers, had actual or constructive knowledge that the segregation was *de*

jure, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *Id.* at 96a-97a. The Second Circuit stated that the record left "no doubt" that "the State defendants failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." *Id.* at 109a.

The "amply supported factual findings," the Second Circuit held, "distinguish the present case from *Arthur* v. *Nyquist*," the case on which the district court had relied. *Id.* at 105a. In that case, there was evidence that the state officials "made substantial, repeated efforts" to require local officials in Buffalo to develop and implement a desegregation plan and that "the state officials' decision not to use more drastic measures was the result of legitimate considerations rather than of their capitulation to views they knew to be racially motivated." *Id.* at 106a. The court found the evidence "materially different" with respect to Yonkers, *id.*, and held that the State officials were liable under § 1983.

The Second Circuit further held that the EEOA abrogated the Eleventh Amendment immunity of the State institutional defendants, expressly endorsing the conclusion of the Seventh Circuit in *Gomez* v. *Illinois State Board of Education*, 811 F.2d 1030, 1038 (7th Cir. 1987). Pet. App. 111a. *See also Los Angeles Branch NAACP* v. *Los Angeles Unified Sch. Dist.*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). On the merits of the EEOA claims, the court found the district court's rejection of the claims infected with its misunderstanding of the Second Circuit's *Arthur* decision, and, therefore held that "[p]laintiffs' claims against the State, SED, and the Board of Regents under the EEOA should have been upheld." Pet. App. 115a. For this conclusion, it relied

on the Sixth Circuit's decision in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978).[2]

The State petitioned this Court for review of the Second Circuit's decision, raising questions concerning: (1) whether state education officials could be held liable based on the facts as found by the district court; (2) whether Congress abrogated the states' Eleventh Amendment immunity in the EEOA; (3) the scope of the EEOA; and (4) the statute of limitations. This Court denied certiorari on June 23, 1997. *See* 521 U.S. 1104.

5. On remand, the district court considered the proper remedy, and ultimately adopted "a set of measures * * * designated EIP II." Pet. App. 12a. *See id.* at 54a-62a. Before doing so, however, "the court wisely took the opportunity to revisit the question of whether vestiges of segregation persisted" in the Yonkers schools in 1997. *Id.* at 11a. *See also id.* at 41a. After hearing the evidence, the district court found that the Yonkers Board of Education "has clearly demonstrated by a strong preponderance of the evidence that vestiges of segregation currently exist in the Yonkers Public School system" that EIP I and other existing remedial measures were not "adequate to eradicate." *Id.* at 43a. The court therefore "adopt[ed]" and "reaffirm[ed]" its 1993 vestiges decision. *Id.*

The district court further held that "a causal relationship exists between the conduct of the State" outlined in its earlier findings "and the existence of vestiges of segregation in the

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[2] In the Second Circuit, respondents argued that the State officials and the State itself were liable under Title VI. The court's conclusions with respect to § 1983 and the EEOA made it unnecessary for the court also to consider that basis for liability. *See* Pet. App. 116a. Respondents reserved their right to raise Title VI in support of the judgment below in any future proceedings. The States' Eleventh Amendment immunity is expressly abrogated for Title VI claims. 42 U.S.C. § 2000d-7. *See Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992).

[Yonkers Public Schools]." *Id.* It therefore found the State liable for eliminating such vestiges and for participating in funding a remedy to accomplish that goal. *Id.* at 44a.

6. The State appealed to the Second Circuit. In its initial decision, a divided panel reversed outright on questions related to EIP II. It found that there was insufficient evidence to support the district court's conclusion that vestiges of segregation not being addressed by EIP I continue to exist in the Yonkers schools. 181 F.3d 301, 312-317 (2d Cir. 1999). In the absence of sustainable findings that such vestiges continue, the Second Circuit also rejected the district court's adoption of EIP II as a remedy that "exceeded the admittedly broad power of the district court." *Id.* at 318. The court of appeals, however, sustained the district court's apportionment of remedial costs for EIP I, under which the State was required to share equally in the annual costs of the remedy. That apportionment, the court held, was within the broad equitable discretion of the district court. *Id.* at 320.

Judge Sack dissented in part, objecting to the court's "reversal of the district court's finding of vestiges and its order implementing [EIP II]," and believing that the court should "remand on those issues for the district court to make an adequate statement of its factual findings." *Id.* at 321.

On a petition for rehearing, the court adopted Judge Sack's view. Although the court "adhere[d] to" the conclusions of its initial opinion that "there was insufficient record support for the only two vestiges found by the district court and that the remedy imposed by the district court was unsustainable," Pet. App. 5a, it concluded "upon further reflection, * * * that it is prudent to ask the district court to make further factual findings on the present record and in light of this opinion as to whether—or not—there are remaining vestiges of segregation in the Yonkers school system, and if so what they are and what record evidence is relied on for support." *Id.* The court therefore remanded to the district court for that purpose.

REASONS FOR DENYING THE WRIT

The State's petition is largely a rehash of its 1997 petition seeking review of the Second Circuit's 1996 decision. That petition was appropriately denied by this Court, and the State offers no additional reasons—let alone the sort of compelling reasons that are ordinarily required for this Court to exercise its jurisdiction—for the Court to review the well-supported decisions of the courts below. The State primarily seeks this Court's review of factual findings that the Second Circuit found "amply supported" in the record. To the extent it raises legal issues, the petition identifies no conflict in the circuits or any other factor that should compel this Court to grant review.

Indeed, from all that appears in the petition, nothing has occurred in the three years since the Court denied review to provide any additional reason for review. This static environment confirms that this case involves no recurring or hotly debated-issue warranting this Court's attention.

I. THE HOLDING OF THE COURT BELOW—THAT THE STATE'S OWN CONDUCT VIOLATED THE EQUAL PROTECTION CLAUSE BOTH BY CAPITULATING TO RACIAL PRESSURES IN DEROGATION OF ITS RESPONSIBILITY FOR SCHOOLS AND BY ENCOURAGING RACIAL SEGREGATION IN YONKERS—DOES NOT WARRANT REVIEW

The State's attack on the factual findings below, Pet. 17-20, attempts to isolate out of context the finding that "the State knew about the segregation that existed in the Yonkers Public Schools, knew that Yonkers would not on its own take the steps necessary to end the segregation, and either knew or reasonably should have known that the segregation was *de jure* rather than *de facto*." Pet. App. 134a. That finding, the State contends, "conflicts with this Court's recent precedents holding that actual knowledge, not constructive knowledge,

of constitutional violations is a prerequisite to imposing supervisory liability on governmental entities for the constitutional violations caused by their employees or others under their control." Pet. at 17-18.

This argument is far wide of the mark. In focusing on one sentence of the voluminous record and multiple findings below and on the theory of "supervisory liability," the State has failed to account for the findings of the lower courts establishing its *direct* liability for segregation in Yonkers. There is, in any event, no compelling reason for this Court to review the Second Circuit's application of settled law concerning supervisory liability to the facts of this case. Nor does the decision below implicate any conflict in the lower courts compelling this Court's intervention.

1. The Second Circuit specifically recognized in this case that, to establish an equal protection violation, a plaintiff must "show not only that the state action complained of had a disproportionate or discriminatory impact but also that the action was taken with intent to discriminate." Pet. App. 91a (citing *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973)). The court of appeals also recognized that "the forbidden segregative intent [is] established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet. App. 93a-95a (citing *Yonkers III*, 837 F.2d at 1224; *Smith* v. *Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982)).

In keeping with these settled principles, the State was held liable not simply under the "supervisory liability" theory on which the State's petition is focused but also directly for its own actions. The record is replete with findings—ignored in the petition—that State officials not only failed to act to remedy unlawful segregation in Yonkers but took actions that helped perpetuate segregation. *See, e.g.*, Pet. App. 77a ("In

addition to refusing to act to end segregation in Yonkers, the State took certain actions that had the effect of encouraging that segregation"); *id.* at 77a-78a ("[T]he Board of Regents itself took actions that were, and were recognized to be, designed to cut back on school desegregation"); *id.* at 109a ("[T]he State defendants * * * took actions that encouraged the perpetuation of segregation").

The record, moreover, leaves no doubt about the defendants' motivations and intent for their actions and inaction. The opinions below are replete with findings—not challenged here—that the State's actions and inaction with respect to Yonkers school segregation were a known capitulation to discriminatory views and pressures. *See, e.g., id.* at 97a (State officials "refused to exercise that power [to remedy segregation] because they were capitulating to political pressures that they knew were racially motivated"); *id.* at 106a ("[T]he State acted in a way that had the effect of encouraging the perpetuation of *de jure* segregation and knew that through its actions and omissions it was capitulating to pressures that were racially motivated"); *id.* at 107a (State's failure to act was "the result of a knowing capitulation to racially inspired pressures").

Finding discriminatory intent in such circumstances falls squarely within this Court's previous articulation of equal protection principles. As the Court has observed, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) (quoting *Palmer* v. *Thompson*, 403 U.S. 217, 260-261 (1971) (White, J., dissenting)). *Accord City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

Thus, there is nothing remarkable about imposing liability on the State where it is found to have given quarter to private biases through its actions and inaction. The decisions below instead represent a commonplace application of settled equal protection principles. Indeed, because the decisions hold the State responsible for its *own* actions, they raise none of the concerns at issue in the cases on which the State relies, where the Court adopted particular standards of liability to avoid the risk that a defendant "would be liable in damages not for its own official decision but instead for its employees' independent actions." *Gebser* v. *Lago Vista Ind. School Dist.*, 524 U.S. 274, 290-291 (1998). *See* Pet. 18, 20. The unchallenged findings below fully support the Second Circuit's decision imposing liability on the State for its own official decisions with respect to Yonkers.

In light of the unchallenged findings that the State itself undertook racially discriminatory actions in response to pressures it knew to be motivated by racial animus, the petition's exclusive focus on issues of supervisory liability simply fails to account for the decisions of the courts below—which focused on the *State's* actions and the *State's* intent in taking those actions. Those decisions are fully supported by the factual findings and settled principles of law, and the State has identified no reason for this Court to consider application of those principles to the facts at issue here. There is, therefore, no need to consider the State's primary argument that the courts below grounded its liability on inadequate factual findings concerning its knowledge of and participation in discriminatory actions of local officials.

2. Even if it could be shown that the only basis on which the State was held liable was that it "should have known" of the constitutional violations in Yonkers yet did nothing to correct them, certiorari would still be unwarranted.

There is no dispute about the state of mind applicable to "claims under § 1983 alleging that a municipality's actions in

failing to prevent a deprivation of federal rights was the cause of the violation." *Gebser*, 524 U.S. at 291. Under *City of Canton* v. *Harris*, 489 U.S. 378, 388-389 (1989), a governmental entity will be held liable where its actions amounted to "deliberate indifference" to the constitutional rights at issue. In *Board of County Commissioners of Bryan County* v. *Brown*, 520 U.S. 397, 407 (1997), for example, the Court held that "a plaintiff seeking to establish liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." Under this standard, municipal decisionmakers' "continued adherence to an approach that they know *or should know* has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Id.* (emphasis added).

To the extent they addressed the State's failure adequately to control the actions of the local entities, the decisions below are comfortably within the standards articulated by this Court. Quite clearly, the factual findings made by the district support the view that the State continued to adhere to an approach toward Yonkers—"hands off"—that it knew or should have known had failed to prevent segregative actions in the Yonkers schools. *See, e.g.* Pet. App. 129a-42a (even though the State received specific notice that "'Yonkers public schools really need[ed] investigation'" due to "gerrymandered" attendance boundaries and other racial inequities, recognized that "Yonkers would not on its own take the steps necessary to end the segregation," and had available "several effective means" routinely used to ensure local school district compliance with legal and education standards where race was not involved, it "essentially adopted a wait-and-see attitude" and knowingly tolerated a racially dual system of schools in Yonkers for over two decades). Under *City of*

Canton and *Bryan County*, such conduct by the State readily qualifies as "deliberate indifference" sufficient to impose liability under § 1983.

The State complains that the Second Circuit erred by relying on a finding that the State "either knew or reasonably should have known that the segregation [in Yonkers] was *de jure* rather than *de facto*," Pet. App. 134a, arguing that this finding illegitimately imposed liability on the basis of its "constructive knowledge" of constitutional violations. Pet. 17-20. Even the State, however, does not contend that direct proof of actual knowledge is necessary, for it recognizes that a municipality can be liable where officials "deliberately disregarded constitutional consequences which were actually known *or plainly obvious*." Pet. 18 (citing *Bryan County*, *supra*) (emphasis added). *See also id.*, 520 U.S. at 407 (plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences"); *Farmer* v. *Brennan*, 511 U.S. 825, 841 (1994) ("*Canton* understanding of deliberate indifference[] permit[s] liability to be premised on obviousness or constructive notice"). Again, this standard is readily met on the factual findings here. *See, e.g.*, Pet. App. 129a-142a.

While the State apparently contends that *Gebser* and *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), impose a higher standard of proof, Pet. 18, it never made any such argument below. Indeed, although *Gebser* was decided before the September 1998 oral argument of the case in the Second Circuit, the State never took any steps to bring that case to the attention of the court of appeals or to explain how it thought the decision undermined the basis for liability. *Gebser* and *Monroe County*, moreover, took place in an entirely different context—involving liability for sexual harassment under Title IX of the Education Amendments of 1972, 42 U.S.C. § 1681 *et seq.* This Court has recognized that the applicable "deliberate indifference" standard might well mean different things in different contexts, *see Farmer*,

511 U.S. at 840-842, and the State's attempt to import the standards of *Gebser* and *Monroe* into a different statutory context is therefore unfounded.

Nor is there any suggestion in the petition that the lower courts are wrestling with application of the *Gebser* standard to desegregation cases arising under § 1983 and reaching different results. Indeed, while the Second Circuit has not been asked to apply *Gebser* to the context at issue here, it is clear that the Second Circuit understands *Gebser* and applies it where appropriate under this Court's decisions. *See Gant* v. *Wallingford Bd. of Educ.*, 195 F.3d 134, 141 n.6 (2d Cir. 1999) ("The Supreme Court has rejected the use of * * * an objective ('should have known') test for deliberate indifference in the Title IX context, as well as in the Eighth Amendment context") (citations omitted). There is no compelling reason to grant certiorari on the bald assumption that the Second Circuit will err—let alone that a conflict will develop—if it is asked to consider the implications of *Gebser* and *Monroe County* in a context analogous to the one here.

3. As it did in its 1997 petition, the State posits a conflict between the decision below and *Reid* v. *Kayye*, 885 F.2d 129 (4th Cir. 1989), and "[a] case very similar to" it (*id.* at 132)—*Bush* v. *Viterna*, 795 F.2d 1203 (5th Cir. 1986). *See* Pet. 20-21. The purported conflict is wholly illusory.

The plaintiffs in both *Reid* and *Bush* attempted to hold state officials liable under § 1983 for allegedly unconstitutional conditions at county jails. In each case, the attempt was rejected on the ground that, while the state officials may have had *authority* under state law to make recommendations or take some corrective action with respect to the conditions of which plaintiffs complained, they had no state law-imposed *duty* or *responsibility* to do so. *See Reid*, 885 F.2d at 131. Both courts recognized, however, that a state official can be held to have "caused" for § 1983 purposes a violation of

federal rights on a supervisory liability theory. *See id.* at 131-132;[3] *Bush*, 795 F.2d at 1206, 1208.

Here, the Second Circuit determined that the State officials *did* have both power *and* responsibility to take action in response to the unconstitutional acts and conditions that they knew were occurring in Yonkers. The State argued in the court below that "the judgment in their favor should be upheld on the basis that, under New York law, they lacked legal authority or responsibility to intervene in Yonkers to remedy the unlawful segregation." Pet. App. 107a. The Second Circuit, however, concluded that "this contention need not detain us long" in light of "express provisions of New York statutory law" which specifically direct that state officials "shall enforce" all laws relating to education and are charged with the "duty" to take necessary steps to that end. *Id.* at 107a-108a (emphasis omitted). Pointing to various provisions of the New York Education law (and also to several New York state cases), *see id.*, the Second Circuit stated: "Given the statute's clear impositions of duty and grants of power, the State defendants' twin disclaimers of responsibility and authority are meritless." *Id.* at 109a.[4]

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[3] "It is true that, while the doctrine of *respondeat superior* cannot be invoked in § 1983 cases, supervisory officials may be held liable in certain circumstances for constitutional injuries inflicted by their subordinates. Liability in those circumstances is not premised on *respondeat superior* but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in constitutional injuries." *Reid*, 885 F.2d at 131-132 (citation omitted).

[4] The record below also contains extensive evidence—in the form of admissions both by state officials and in state policy statements and reports—that the State consistently has conceded that it has a duty to prevent and remedy school segregation. *See, e.g.*, Trial Exhibit 3-7 (1968 Policy Statement of State Board of Regents: "Where a district fails or refuses to act [to prevent or remedy school segregation], then the responsibility for corrective action is clearly and inescapably that of the State"). The record further contains extensive evidence as well as district court findings confirming that, with respect to issues other than school

In light of all this—a central focus of the Second Circuit's 1996 decision—there is no basis for the State's assertion that "the Second Circuit undertook no analysis of the respective state and local roles which exist as a matter of state law." Pet. 20. The State's complaint is instead with the Second Circuit's fully supported analysis of that very point. The Second Circuit's understanding of the responsibilities imposed on the State officials under New York law is clearly an issue of state law that does not merit this Court's attention.[5]

Furthermore, even if the State had no duty under New York law to prevent the establishment and maintenance of an unlawful dual school system in Yonkers, but only discretionary authority to do so, its failure to exercise that authority *because of* illegitimate racial reasons is sufficient to impose liability. *See DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) (although Due Process Clause does not require a State to provide protective services, failure to do so for discriminatory reasons violates Equal Protection Clause) (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)); *see also DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting) (under *DeShaney* footnote 3, state "inaction" violates equal protection if it is "the product of invidious discrimination"). In neither *Reid* nor *Bush* was there an allegation that state officials failed to act for racially

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segregation and desegregation, the State not only has acknowledged but also has vigorously discharged its duty to supervise the schools and to take corrective action as necessary to ensure full compliance by Yonkers officials with federal and state law and policy. *See, e.g.*, Pet. App. 139a (finding that New York State Education Department "is one of the most activist state educational bodies in the country").

[5] *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts"); *see also County Ct. of Ulster County* v. *Allen*, 442 U.S. 140, 153-154 (1979) (the Second Circuit's "experience with New York practice is entitled to respect").

invidious reasons. Here, by contrast, in factual findings ignored by the State, the courts below found that the State officials "had the power to take steps to remedy [the segregation in Yonkers], and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." Pet. App. 97a.

This case is therefore like *Penick* v. *Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), in which state education officials, including the state board of education, were found liable for segregation in Ohio. Much like the New York state defendants in this case, the Ohio state board was found liable for "adopt[ing] a 'hands-off, let someone else do it' approach" to school desegregation. 663 F.2d at 27. Thus, far from creating an intercircuit conflict, the court below likely *avoided* conflict by following *Penick*.

II. THE HOLDING OF THE COURTS BELOW THAT THE STATE REMAINS LIABLE FOR COSTS OF EIP I ON THE FACTS OF THIS CASE DOES NOT WARRANT REVIEW.

There is no reason to grant review to consider the State's specious contention that the Second Circuit has concluded that it is permissible to require the funding of a remedy without any finding of vestiges. Pet. at 22-24. Under the Second Circuit's decision, the State has been required to contribute only to EIP I—the remedy that was first implemented in 1986. Although that remedy has been successful in eliminating segregation in school *enrollment*, that is but one step in achieving a truly unitary school system, and measures adopted in EIP I also attempted to address the additional steps that would be necessary to achieve unitary status.[6] In its 1997 decision, the district court rejected "[t]he

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[6] The State deems the absence of a "formal[] * * * declaration" of unitary status "immaterial," and would have this Court simply assume that the Yonkers school district is unitary. Pet. 23. But

claim that EIP I's goals have already been fulfilled," Pet. App. 53a, and ordered continued funding by the State of EIP I, *see, e.g.*, Pet. App. 33a. The State did not challenge that finding on appeal.

While the Second Circuit reversed the finding that certain previously unaddressed vestiges justified the *additional* remedies of EIP II, it plainly understood that EIP I presented separate issues and affirmed the district court's decision to provide ongoing remedies for conditions identified by the district court in 1985 and 1986. *See* Pet. App. 30a-31a. To the extent the State's argument depends on the Second Circuit's vacatur of the 1997 district court decision, moreover, the argument is premature, because the case was remanded to the district court for further factual findings. Thus, the State's second question presented is premised on a purported finding that was not made and is therefore hypothetical.

III. THE HOLDING OF THE COURT BELOW THAT THE STATE INSTITUTIONAL DEFENDANTS WERE LIABLE UNDER THE EQUAL EDUCATIONAL OPPORTUNITIES ACT IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS AND DOES NOT WARRANT REVIEW.

The Second Circuit held in its 1996 decision that the State institutional defendants were liable under the EEOA. *See*

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this Court has made clear that "[p]roper resolution of any desegregation case turns on a careful assessment of it facts," *Freeman*, 503 U.S. at 474, and is therefore committed to the sound and informed discretion of a district court judge. *See, e.g., id.* at 487; *Board of Educ.* v. *Dowell*, 498 U.S. 237, 249-250 (1991). There is no authority for the State's claim that a court, much less this Court in the first instance, may assume unitary status where no party has requested a declaration of that status and where the careful inquiries directed to that determination have yet to be made.

Pet. App. 110a-115a.[7] The State contends that the Second Circuit erred in holding (1) that in the EEOA Congress abrogated the States' Eleventh Amendment immunity from suit, *see* Pet. 24-27, and (2) that the State institutional defendants were liable under the EEOA. *See id.* at 28-30. Neither contention merits review.[8]

1. The State's Eleventh Amendment argument is nearly word-for-word the same as the argument in its earlier petition.[9] It identifies no new court of appeals decisions on the subject and no new principles of law from this Court's cases which might counsel in favor of reviewing the Second Circuit's 1996 decision on the EEOA. Instead, the State simply repeats its challenge to the way in which settled law concerning Eleventh Amendment immunity has been unanimously applied by the lower courts in the EEOA context. In these circumstances, review is not warranted.

a. As the State concedes, the Seventh and Ninth Circuits agree with the Second Circuit's conclusion that the EEOA abrogates a State's Eleventh Amendment immunity. *See* Pet. 27 (citing *Gomez*, 811 F.2d at 1037 ("Congress abrogated the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the [EEOA]"),

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[7] The Second Circuit recognized that the Eleventh Amendment barred the imposition of liability against the State institutional defendants pursuant to § 1983. *See* Pet. App. 110a (citing *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989)).

[8] As an initial matter, we note that issues surrounding the EEOA have little independent significance in this case. A determination that the judgment must be reversed to the extent it relies on the EEOA would not affect the judgment against State officials under 42 U.S.C. § 1983.

[9] Indeed, the State apparently did not even bother to update the only record citation in its Eleventh Amendment argument to reflect the fact that the petition appendix pages have changed with the addition of the more recent Second Circuit and district court decisions. *Compare* Pet. at 26 (citing Pet. App. 46a) *with* 1997 Pet. at 22 (citing Pet. App. 46a for the same quotation).

and *Los Angeles Branch NAACP*, 714 F.2d at 950 ("Congress abrogated California's immunity from suit in desegregation cases by enacting [the EEOA]")).[10] With admirable (but misguided) pluck, the State argues that the unanimity of the Second, Seventh, and Ninth Circuits is itself a reason "why certiorari is warranted in this case." Pet. 27. This Court's usual practice, however, is to step into a legal fray only when the circuit courts are at odds. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

The State implies that *Gomez* and *Los Angeles Branch NAACP* are somehow flawed (although no court has rejected them) because they were "decided before *Dellmuth* [v. *Muth*, 491 U.S. 223 (1989)] and this Court's more recent pronouncements" on the Eleventh Amendment. Pet. 27. The Court's "more recent pronouncements," however, have not altered the settled test for determining when Congress has abrogated the States' immunity, but rather focus on whether the abrogation is constitutionally-authorized—something the State has not challenged.[11] Thus, for example, in 1985—two years before *Gomez* was decided—this Court could say that the requirements for Eleventh Amendment abrogation were already "well established in our cases." *Atascadero State*

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[10] *Accord Stanley* v. *Darlington County Sch. Dist.*, 879 F. Supp. 1341, 1363-67 (D.S.C. 1995), *rev'd on other grounds*, 84 F.3d 707 (4th Cir. 1996); *Board of Pub. Educ. for Savannah* v. *Georgia*, No. CV 490-101, 1990 WL 608208, at *6 (S.D. Ga. Sept. 24, 1990) ("*Savannah Board*").

[11] The State does not dispute that the EEOA was "passed pursuant to a constitutional provision granting Congress the power to abrogate." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 59 (1996). In any event, "[t]here can be no dispute that the EEOA was passed pursuant to the enforcement authority of § 5 of the Fourteenth Amendment." *Gomez*, 811 F.2d at 1037. Section 5, of course, grants Congress abrogation power. *See Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000); *Seminole Tribe*, 517 U.S. at 59.

Hosp. v. *Scanlon*, 473 U.S. 234, 242 (1985). Although *Dellmuth*—the only recent case other than *Atascadero* on which the State relies heavily—was decided after *Gomez*, both *Stanley* and *Savannah Board* cite *Dellmuth* but hold that the EEOA abrogates Eleventh Amendment immunity. At all events, as shown below, this holding is in no way contrary to *Atascadero* or *Dellmuth*.

b. That the EEOA abrogates state sovereign immunity is not only the unanimous view of the courts of appeals, it is the legally correct view. "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.' " *Seminole Tribe*, 517 U.S. at 55 (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786 (1991)). As every court that has considered the issue has determined, the language of the EEOA—specifically, 20 U.S.C. §§ 1703 and 1706—meets this standard. *See Gomez*, 811 F.2d at 1037 (it is "clear" that the EEOA abrogates state sovereign immunity); *Los Angeles Branch NAACP*, 714 F.2d at 951 (EEOA "clearly" abrogates Eleventh Amendment); *Stanley* v. *Darlington County Sch. Dist.*, 879 F. Supp. at 1365 ("The EEOA clearly manifests Congress' intent to abrogate Eleventh Amendment immunity for suits brought under the EEOA"); *Savannah Board*, 1990 WL 608208, at *6 ("Congress' intention to abrogate the states' immunity is clearly expressed in the text of the [EEOA]").

Section 1703 provides: "No *State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system" (emphasis added). Creating a judicial remedy for this State-targeted command, section 1706 then provides that "[a]n individual denied an equal educational opportunity * * * may institute a civil action in an appropriate district court of the United States *against such parties*, and for such relief, *as may be*

appropriate" (emphasis added). The combined effect of these provisions is clear: "The 'appropriate parties' against whom such a civil action may be instituted are those upon whom the statutory obligations and prohibitions are imposed—namely, the 'State.' " *Stanley*, 879 F. Supp. at 1366. Thus, "[r]ead together, the text of 20 U.S.C. §§ 1703 and 1706, is specific enough to indicate clearly Congress' unequivocal intent to abrogate." *Savannah Board*, 1990 WL 608208, at *6.[12]

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court relied upon the language of section 5 of the Fourteenth Amendment—in which "Congress is expressly granted authority to enforce 'by *appropriate* legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority," *id.* at 456 (quoting section 5; emphasis added)—to hold that section 5 permits Congress to abrogate the Eleventh Amendment. Since section 1703 cannot be read as anything other than an express limitation on state authority, ("No State shall deny equal educational opportunity to an individual on account of his or her race"), a suit against a State must be a suit against an "appropriate" party under section 1706.[13]

The decision below is not contrary to *Atascadero* or *Dellmuth*. The statute at issue in *Atascadero* was the Rehabilitation Act, which at that time afforded relief against "any

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[12] Although Congress' intent to abrogate the Eleventh Amendment must be clearly expressed in statutory text, such a clear expression can be found in text lacking "explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth*, 491 U.S. at 233 (Scalia, J., concurring) (fifth vote for majority).

[13] *Cf. Winbush* v. *Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995) (holding that the provision of Title VII giving courts power to grant any "equitable relief as the court deems *appropriate*," 42 U.S.C. § 2000e-5(g)(1) (emphasis added), abrogates the Eleventh Amendment to allow awards of prejudgment interest on damages against States); *Pegues* v. *Mississippi State Employment Serv.*, 899 F.2d 1449, 1454 (5th Cir. 1990) (same).

recipient of Federal assistance." 29 U.S.C. § 794a(a)(2). The Court held that this "general authorization for suit in federal court" was insufficient to abrogate state sovereign immunity because it did not "subject the States to federal jurisdiction * * * specifically." 473 U.S. at 246. Sections 1703 and 1706, however, "do not simply authorize relief against a general, undefined class of defendants that may or may not include the state and its agencies." *Stanley*, 879 F. Supp. at 1366-67 n.16. Rather, section 1706 authorizes suits in federal court against "appropriate" parties and section 1703 "mentions specifically the state," *Savannah Board*, 1990 WL 608208, at *6, and "expressly contemplates that relief is to be obtained from the state." *Gomez*, 811 F.2d at 1038. Thus, there is no conflict between *Atascadero* and the Second Circuit's 1996 decision in this case. *See id.* at 1037-38 (distinguishing *Atascadero*); *Stanley*, 879 F. Supp. at 1366 n.16 (same); *Savannah Board*, 1990 WL 608208, at *6 (same).

Nor is the 1996 decision contrary to *Dellmuth*. As in *Atascadero*, the statute at issue in *Dellmuth*—the Education of the Handicapped Act ("EHA")—contained little more than a general authorization for suit in federal court. The Court rejected the attempt of the proponent of abrogation to distinguish *Atascadero* on the ground that "the EHA 'is replete with references to the states,' " 491 U.S. at 232 (quoting the respondent's brief), saying that this created nothing more than "a permissible inference" that the Congress intended for States to be amenable to suit in federal court. *Id.*[14] There is, however, nothing in the EHA akin to section 1703's express injunction against the States and section 1706's authorization of suit against "appropriate" parties—language that collectively creates much more than a mere permissible inference

[14] *But cf. Seminole Tribe*, 517 U.S. at 57 ("[T]he numerous references to the 'State' in the text of [the Indian Gaming Regulatory Act] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit").

that Congress intended abrogation. Thus, although the Court could say in *Dellmuth* that the EHA did not "address abrogation in even oblique terms" and "in no way intimate[d] that the States' sovereign immunity is abrogated," 491 U.S. at 231, the same certainly cannot be said here.

As noted, no court has reached a contrary conclusion. The issue, moreover, apparently arises so infrequently that no court of appeals has been called on to consider it since the Second Circuit's 1996 decision, and prior to that, in the preceding decade. Certiorari is not warranted on this issue.

2. The Second Circuit also held correctly that the State institutional defendants were liable under the EEOA. The State's submission that the Court should review this conclusion, Pet. 28-30, not only fails to cite a single case considering the EEOA question since the time of its 1997 petition but also fails to cite a case decided in the last 18 years. This fact alone demonstrates that the rarely-occurring question the State presents does not merit review here. In addition, there is no conflict implicated by the decision below, which is demonstrably correct in all events.

In the EEOA, Congress declared it to be the policy of the United States that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin." 20 U.S.C. § 1701(a)(1). As noted above, section 1703 of the EEOA provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, or national origin, by * * * (b) the failure of an educational agency which has formerly practiced [race-based] deliberate segregation to take affirmative steps * * * to remove the vestiges of a dual school system." The EEOA defines the term "educational agency" as a "State education agency" or a "local educational agency." *Id.* at 1720(a).

Under the plain language of the EEOA, then, a State denies equal educational opportunity "by" the failure of a local

educational agency to eliminate the vestiges of segregation. Therefore, the Second Circuit correctly held that the principles articulated in *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978), supported the imposition of liability on the State institutional defendants under the EEOA on the same facts that warranted the imposition of liability on the State officials under the Equal Protection Clause. *See* Pet. App. 113a-114a.

The State contends that the Second Circuit concluded that liability under section 1703(b) of the EEOA is broader than under the Fourteenth Amendment, Pet. 28, in conflict with *United States* v. *Texas*, 680 F.2d 356 (5th Cir. 1982). In that case, the Fifth Circuit held that evidence *insufficient* to establish an equal protection violation was also insufficient to establish an EEOA violation. Here, the Second Circuit held that evidence *sufficient* to establish an equal protection violation also established an EEOA violation. Pet. App. 115a. There is no logical inconsistency between these holdings. Moreover, the State is incorrect when it asserts that the Second Circuit held that the EEOA is broader than the Equal Protection Clause. Rather, it stated that "the EEOA provides protections *similar* to those provided by the Equal Protection Clause," *id.* at 112a (emphasis added), and found the EEOA violated "for the same reasons" it had found the constitutional provisions violated. *Id.* at 115a. Since the Second Circuit imposed liability under the EEOA based upon the same factual findings for which it imposed liability under the Equal Protection Clause, it is not necessary to the Second Circuit's decision for the EEOA to go beyond the Equal Protection Clause and the judgment below can stand even if that proposition is untrue.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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